No. 14-114

IN THE

Supreme Court of the United States

DAVID KING; DOUGLAS HURST;
BRENDA LEVY; and ROSE LUCK,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, as U.S. Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; JACOB LEW, as U.S. Secretary of the Treasury; UNITED STATES DEPARTMENT OF TREASURY; INTERNAL REVENUE SERVICE; and JOHN KOSKINEN, as Commissioner of Internal Revenue,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 31, 2014
CERTIORARI GRANTED NOVEMBER 7, 2014

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U.S. District Court
Eastern District of Virginia – (Richmond)
CIVIL DOCKET FOR CASE #: 3:13-CV-00630-JRS

King et al v. Sebelius et al
Assigned to: District Judge James R. Spencer
Case in other court: 14-01158
Cause: 05:0706 Judicial Review of Agency Action

Date Filed: 09/16/2013
Date Terminated: 02/18/2014
Jury Demand: None
Nature of Suit: 899 Other Statutes: Administrative Procedures Act/Review or Appeal of Agency Decision
Jurisdiction: U.S. Government Defendant

Date Filed	#	Docket Text
09/16/2013	1	COMPLAINT against Internal Revenue Service, Jacob Lew, Kathleen Sebelius, United States Department of Health and Human Services, United States Department of the Treasury (Filing fee: $400.00; receipt number 34683022458), filed by Brenda Levy, Rose Luck, Douglas Hurt, David King. (Attachments: # 1 Civil Cover Sheet, #2 Receipt)(jtho,) (Entered: 09/16/2013)

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09/19/2013	5	MOTION for Summary Judgment by Douglas Hurst, David King, Brenda Levy, Rose Luck. (Attachments: # 1 Affidavit of David King, # 2 Affidavit of Brittany La Couture, # 3 Affidavit of Douglas Hurst, # 4 Affidavit of Brenda Levy, # 5 Affidavit of Rose Luck)(Berry, Jonathan) (Entered: 09/19/2013)
09/19/2013	6	MOTION for Preliminary Injunction by Douglas Hurst, David King, Brenda Levy, Rose Luck. (Attachments: # 1 Affidavit of W. Thomas Haynes)(Berry, Jonathan) (Entered: 09/19/2013)

***

10/16/2013	18	Memorandum in Opposition re 6 MOTION for Preliminary Injunction filed by Internal Revenue Service, Jacob Lew, Kathleen Sebelius, United States Department of Health and Human Services, United States Department of the Treasury, Daniel Werfel. (Attachments: # 1 Exhibit 1—Declaration of D. Moulds, # 2 Exhibit 2—Transcript of Hearing before H. Comm.)(Wu, Elizabeth) (Entered: 10/16/2013)

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10/23/2013	21	REPLY to Response to Motion re 6 MOTION for Preliminary Injunction filed by Douglas Hurst, David King, Brenda Levy, Rose

		Luck. (Berry, Jonathan) (Entered: 10/23/2013)
		***
10/31/2013	24	Minute Entry for proceedings held before District Judge James R. Spencer: Motion Hearing held on 10/31/2013 re 6 MOTION for Preliminary Injunction filed by Douglas Hurst, Brenda Levy, Rose Luck, David King, Motion for Preliminary Injunction – DENIED. (Court Reporter Jeff Kull, OCR.)(khan,) (Entered: 10/31/2013)
		***
11/18/2013	30	MOTION to Dismiss *or, in the Alternative, Cross-Motion for Summary Judgment* by Internal Revenue Service, Jacob Lew, Kathleen Sebelius, United States Department of Health and Human Services, United States Department of the Treasury, Daniel Werfel. (Wu, Elizabeth) (Entered: 11/18/2013)
11/18/2013	31	Memorandum in Support re 30 MOTION to Dismiss *or, in the Alternative, Cross-Motion for Summary Judgment* filed by Internal Revenue Service, Jacob Lew, Kathleen Sebelius, United States Department of Health and Human Services, United States Department of the Treasury, Daniel Werfel. (Attachments: # 1 Appendix

		Exhibits in Support of Defendants' Motion to Dismiss, or in the Alternative, Cross-Motion for Summary Judgment)(Wu, Elizabeth) (Entered: 11/18/2013)
		***
11/20/2013	33	ORDER denying 6 Plaintiffs' Motion for Preliminary Injunction. (See Order for Details). Signed by District Judge James R. Spencer on 11/20/13. (jtho,) (Entered: 11/20/2013)
		***
11/27/2013	40	Opposition to 30 MOTION to Dismiss *or, in the Alternative, Cross-Motion for Summary Judgment*, REPLY to Response to Motion re 5 MOTION for Summary Judgment filed by Douglas Hurst, David King, Brenda Levy, Rose Luck. (Berry, Jonathan) (Entered: 11/27/2013)
		***
12/06/2013	44	Reply *in Support of Defendants' 30 Motion to Dismiss or, in the alternative, Cross-Motion for Summary Judgment* filed by Internal Revenue Service, Jacob Lew, Kathleen Sebelius, United States Department of Health and Human Services, United States Department of the Treasury, Daniel Werfel. (Wu, Elizabeth). Modified docket entry on 12/06/2013. (walk,).

(Entered: 12/06/2013)

***

02/18/2014	52	MEMORANDUM OPINION. Signed by District Judge James R. Spencer on 2/18/14. (jtho,) (Entered: 02/18/2014)
02/18/2014	53	ORDER that this matter is before the Court on a Motion for Summary Judgment filed by Plaintiffs and Motion to Dismiss filed by Defendants; the Motion to Dismiss 30 is GRANTED; all remaining motions are DENIED AS MOOT. Signed by District Judge James R. Spencer on 2/18/14. (jtho,) (Entered: 02/18/201)
02/19/2014	54	NOTICE OF APPEAL as to 53 Order, by Douglas Hurst, David King, Brenda Levy, Rose Luck. Filing fee $ 505, receipt number 0422-3856504. (Berry, Jonathan) Modified text on 2/19/2014 (tdai,). (Entered: 02/19/2014)

***

07/22/2014	56	Opinion of USCA, AFFIRMED the judgment of the district court re 54 Notice of Appeal attached copy of judgment will not take effect until issuance of the mandate. (jgra,) (Entered: 07/22/2014)
07/22/2014	57	USCA JUDGMENT, AFFIRMED judgment of the district court as to 54 Notice of Appeal filed by Douglas Hurst, Brenda Levy, Rose Luck,

David King (jgra,) (Entered: 07/22/2014)

***

11/10/2014	59	USCA received notice from the Supreme Court of the United States GRANTING the petition for a writ of certiorari re 54 Notice of Appeal: (jgra,) (Entered: 11/10/2014)

General Docket
United States Court of Appeals for the Fourth Circuit

Court of Appeals Docket #: 14-1158
Nature of Suit: 2899 Other Statutes
David King v. Sylvia Burwell
Appeal From: United States District Court for the Eastern District of Virginia at Richmond
Fee Status: fee paid
Case Type Information:
1) Civil U.S.
2) United States
3) null
Originating Court Information:
District: 0422-3 : 3:13-cv-00630-JRS
***
Presiding Judge: James R. Spencer, Senior U.S. District Court Judge
Date Filed: 09/16/2013

Docketed: 02/21/2014
Termed: 07/22/2014

Date Order/Judgment: 02/18/2014
Date Order/Judgment EOD: 02/18/2014
Date NOA Filed: 02/19/2014
Date Rec'd COA: 02/20/2014

DAVID KING; DOUGLAS HURST; BRENDA LEVY; ROSE LUCK

Plaintiffs – Appellants

v.

SYLVIA MATHEWS BURWELL, in her official capacity as U.S. Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; JACOB LEW, in his official capacity as U.S. Secretary of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY; INTERNAL REVENUE SERVICE; JOHN KOSKINEN, in his official capacity as Commissioner of International Revenue

Defendants – Appellees

02/21/2014	1	Case docketed. Originating case number: 3:13-cv-00630-JRS. Case manager: Jeff Neal. [14-1158] (JSN)
		***
02/21/2014	10	MOTION by Appellants Douglas Hurst, David King, Brenda Levy and Rose Luck to accelerate case processing.. Date and method of service: 02/21/2014 ecf. [999301854] [14-1158] Michael Carvin
		***
02/24/2014	12	ORDER filed [999302131] granting Motion to accelerate case processing [10] Is oral argument request: Yes Copies to all parties.. [14-1158]

(TW)

***

03/03/2014	14	BRIEF by Appellants Douglas Hurst, David King, Brenda Levy and Rose Luck in electronic and paper format. Type of Brief: Opening. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/04/2014. [999307288] [14-1158] Michael Carvin

***

03/18/2014	33	BRIEF by Appellees IRS, John Koskinen, Jacob Lew, Kathleen Sebelius, HHS and United States Department of the Treasury in electronic and paper format. Type of Brief: Response. Method of Filing Paper copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/18/2014, [999317368] [14-1158] Alisa Klein

***

03/25/2014	66	BRIEF by Appellants Douglas Hurst, David King, Brenda Levy and Rose Luck in electronic and paper format. Type of Brief: Reply. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched or Delivered to Court: 03/26/2014. [999322965] [14-1158] Michael Carvin

***

05/14/2014	78	ORAL ARGUMENT heard before the Honorable Roger L. Gregory, Stephanie D. Thacker and Andre M. Davis. Attorneys arguing case: Stuart Alan Raphael for Amicus Supporting Appellee Commonwealth of Virginia, Mr. Michael Anthony Carvin for Appellants David King, Douglas Hurst, Brenda Levy and Rose Luck and Stuart F Delery for Appellees United States Department of the Treasury, HHS, IRS, Kathleen Sebelius, Jacob Lew and John Koskinen. Courtroom Deputy: Lisa Robertson. [999356159] [14-1158] (LER)
		***
07/22/2014	83	PUBLISHED AUTHORED OPINION filed. Originating case number: 3:13-cv-00630-JRS. [999400355]. Annotation added to opinion reflecting Supreme Court History. –[Edited 12/02/2014 by SJC] [14-1158] (JSN)
07/22/2014	84	JUDGMENT ORDER filed. Disposition method: 14-1158 opn.p.arg. Decision: Affirmed. Originating case number: 3:13-cv-00630-JRS. Entered on Docket Date: 07/22/2014. [999400363] Copies to all parties and the district court/agency.. [14-1158] (JSN)
08/05/2014	85	SUPREME COURT REMARK— petition for writ of certiorari filed.

07/31/2014. 14-114. [14-1158] (AW)

***

11/10/2014	87	SUPREME COURT REMARK— petition for writ of certiorari granted. 11/07/2014 [14-1158] (SJC)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DAVID KING 6214 John Wayne Drive Fredericksburg, Virginia 22407;	)	
DOUGLAS HURST 4839 Kempsville Greens Parkway Virginia Beach, Virginia 23462;	)	Civil No. 3:13-cv-630
BRENDA LEVY 2724 Mohawk Drive Richmond, Virginia 23235;	)	
ROSE LUCK 2209 County Drive Petersburg, Virginia 23803	)	
Plaintiffs,	)	
v.	)	
KATHLEEN SEBELIUS, in her official capacity as U.S. Secretary of Health and Human Services; and the UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES 200 Independence Avenue SW Washington, District of Columbia 20201;	)	
JACOB LEW, in his official	)	

capacity as U.S. Secretary of the Treasury; and the
UNITED STATES DEPARTMENT OF THE TREASURY
1500 Pennsylvania Avenue NW
Washington, District of Columbia 20220; and

DANIEL WERFEL, in his official capacity as Acting Commissioner of Internal Revenue;
and the
INTERNAL REVENUE SERVICE
1111 Constitution Avenue NW
Washington, District of Columbia 20004,

Defendants.

COMPLAINT

1. One of the pillars of the Patient Protection and Affordable Care Act ("ACA" or "the Act") is its creation of new health insurance "Exchanges"—state-level clearinghouses for standardized insurance products, where insurers will be regulated and individuals can satisfy the individual mandate, the new statutory obligation to purchase comprehensive insurance policies.

2. To encourage states to establish Exchanges, Congress used carrots, such as startup grants to help fund the creation of Exchanges; and sticks, such as prohibiting states from tightening Medicaid eligibility standards before setting up Exchanges. The biggest carrot was the offer of premium assistance subsidies from the Federal Treasury—refundable tax credits to help a state's low- and moderate-income residents buy insurance—if that state set up its own Exchange. States rejecting the offer got a stick instead: the imposition of a federally established, federally operated Exchange in the state, with no subsidies at all.

3. As it turns out, a majority of states have declined to establish Exchanges. That choice has left the federal government with the additional burden of establishing Exchanges in those states, but without the burden of paying for premium assistance subsidies to the residents of those states—just the balance that Congress struck.

4. Notwithstanding express statutory language limiting premium assistance subsidies to Exchanges established by states, the Internal Revenue Service ("IRS") has promulgated a regulation ("the IRS Rule") purporting to authorize subsidies even in states with

only federally established Exchanges, thereby disbursing monies from the Federal Treasury in excess of the authority granted by the Act. The IRS Rule squarely contravenes the express text of the ACA, ignoring the clear limitations that Congress imposed on the availability of the federal subsidies. And the IRS promulgated the regulation without any reasoned effort to reconcile it with the contrary provisions of the statute.

5. While most subsidies benefit recipients, the ACA's subsidies actually serve to financially injure and restrict the economic choices of certain individuals. In particular, many individuals would, but for their eligibility for federal subsidies, be entitled to a "certificate of exemption" from the Act's individual mandate penalty, which is available to low- or moderate-income individuals for whom insurance is unaffordable. For these people, the IRS Rule, by reducing to some extent the out-of-pocket cost of health coverage, effectively subjects them to the individual mandate's requirement to purchase costly, comprehensive health insurance that they otherwise would forgo; further, it prevents them from purchasing cheaper, high-deductible catastrophic coverage that under the ACA may only be sold to individuals who are under age 30 or who have a certificate of exemption from the individual mandate penalty.

6. The IRS Rule's unauthorized subsidies would, in this way, trigger the individual mandate penalty against Plaintiffs, residents of Virginia, which has opted not to establish its own Exchange. The Rule disqualifies them from their eligibility for certificates of exemption, thereby forcing them either to pay a

penalty or to buy comprehensive, costly coverage that they do not want; it also prevents them from buying cheaper, catastrophic coverage using their own funds.

7. Accordingly, Plaintiffs seek a declaratory judgment that the IRS Rule is illegal under the Administrative Procedure Act, and injunctive relief barring its enforcement.

I. JURISDICTION AND VENUE

8. Because this action arises under the federal Administrative Procedure Act ("APA"), 5 U.S.C. § 706, this Court has federal question jurisdiction under 28 U.S.C. § 1331.

9. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(C), because the defendants are officers and agencies of the United States and Plaintiffs reside in this District.

10. Venue is proper in this Division under this Court's Local Rule 3(c), because Plaintiffs David King, Brenda Levy, and Rose Luck reside in this Division.

II. PARTIES

11. Plaintiff David King is a resident of Virginia, which has opted not to establish its own insurance Exchange. He is married, his projected household income for 2014 is $39,000, and he will be 63 years old on January 1, 2014. King is not eligible for employer- or government-sponsored health coverage that satisfies the individual mandate. Absent the IRS Rule, King would be entitled to a certificate of exemption from the individual mandate penalty for 2014, because the cheapest bronze plan approved for sale to him on the federal Exchange in Virginia would cost more than 8% of his projected household

income for 2014 (*i.e.*, more than $260 per month). But because the IRS Rule makes him eligible for a subsidy that would reduce his out-of-pocket cost to below that figure, he will be disqualified from that otherwise-applicable exemption and subject to the individual mandate penalty. As a result, King will be forced to either pay a penalty or purchase more insurance than he wants. He is therefore injured by the IRS Rule, because it has the effect of either subjecting him to monetary sanctions or requiring him to alter his behavior to avoid those sanctions. Further, either way, King's financial strength and fiscal planning are immediately and directly affected by this exposure to costs and/or liabilities.

12. Plaintiff Douglas Hurst is a resident of Virginia, which has opted not to establish its own insurance Exchange. He is married, his projected household income for 2014 is $48,000, and he will be 62 years old on January 1, 2014. Hurst is not eligible for employer- or government-sponsored health coverage that satisfies the individual mandate. Absent the IRS Rule, Hurst would be entitled to a certificate of exemption from the individual mandate penalty for 2014, because the cheapest bronze plan approved for sale to him on the federal Exchange in Virginia costs more than 8% of his projected household income (*i.e.*, more than $320 per month). But because the IRS Rule makes him eligible for a subsidy that would reduce his out-of-pocket cost to below that figure, he will be disqualified from that otherwise-applicable exemption and subject to the individual mandate penalty. As a result, Hurst will be forced to either pay a penalty or purchase more insurance than he wants. He is therefore injured by the IRS Rule, because it has the effect of either

subjecting him to monetary sanctions or requiring him to alter his behavior to avoid those sanctions. Further, either way, Hurst's financial strength and fiscal planning are immediately and directly affected by this exposure to costs and/or liabilities.

13. Plaintiff Brenda Levy is a resident of Virginia, which has opted not to establish its own insurance Exchange. She is single, her projected household income for 2014 is $43,000, and she will be 63 years old on January 1, 2014. Levy is not eligible for employer- or government-sponsored health coverage that satisfies the individual mandate. Absent the IRS Rule, Levy would be entitled to a certificate of exemption from the individual mandate penalty for 2014, because the cheapest bronze plan approved for sale to her on the federal Exchange in Virginia costs more than 8% of her projected household income (*i.e.*, more than $287 per month). But because the IRS Rule makes her eligible for a subsidy that would reduce her out-of-pocket cost to below that figure, she will be disqualified from that otherwise-applicable exemption and subject to the individual mandate penalty. As a result, Levy will be forced to either pay a penalty or purchase more insurance than she wants. She is therefore injured by the IRS Rule, because it has the effect of either subjecting her to monetary sanctions or requiring her to alter her behavior to avoid those sanctions. Further, either way, Levy's financial strength and fiscal planning are immediately and directly affected by this exposure to costs and/or liabilities.

14. Plaintiff Rose Luck is a resident of Virginia, which has opted not to establish its own insurance Exchange. She is married, her projected household

income for 2014 is $45,000, and she will be 55 years old on January 1, 2014. Luck is not eligible for employer- or government-sponsored health coverage that satisfies the individual mandate. Absent the IRS Rule, Luck would be entitled to a certificate of exemption from the individual mandate penalty for 2014, because the cheapest bronze plan approved for sale to her on the federal Exchange in Virginia costs more than 8% of her projected household income (*i.e.*, more than $300 per month). But because the IRS Rule makes her eligible for a subsidy that would reduce her out-of-pocket cost to below that figure, she will be disqualified from that otherwise-applicable exemption and subject to the individual mandate penalty. As a result, Luck will be forced to either pay a penalty or purchase more insurance than she wants. She is therefore injured by the IRS Rule, because it has the effect of either subjecting her to monetary sanctions or requiring her to alter her behavior to avoid those sanctions. Further, either way, Luck's financial strength and fiscal planning are immediately and directly affected by this exposure to costs and/or liabilities.

15. Defendant Kathleen Sebelius is the Secretary of the U.S. Department of Health and Human Services. She is sued in her official capacity.

16. Defendant Jacob Lew is the Secretary of the U.S. Department of the Treasury. He is sued in his official capacity.

17. Defendant Daniel Werfel is the Acting Commissioner of Internal Revenue. He is sued in his official capacity.

18. Defendant U.S. Department of Health and Human Services ("HHS") is an executive agency of the United States within the meaning of the APA.

19. Defendant U.S. Department of the Treasury is an executive agency of the United States within the meaning of the APA.

20. Defendant Internal Revenue Service is an executive agency of the United States within the meaning of the APA.

21. Under the IRS Rule, Plaintiffs must by January 1, 2014, either purchase insurance that they otherwise would not purchase or incur penalties. Their injuries are therefore impending.

III. STATUTORY AND REGULATORY BACKGROUND

A. The ACA Offers Subsidies Through State-Run Insurance Exchanges

22. The ACA regulates the individual market for health insurance primarily through insurance Exchanges organized along state lines. HHS describes an Exchange as "a mechanism for organizing the health insurance marketplace to help consumers and small businesses shop for coverage in a way that permits easy comparison of available plan options based on price, benefits and services, and quality." *Initial Guidance to States on Exchanges*, http://www.healthcare.gov/law/resources/regulations/guidance-to-states-on-exchanges.html (last visited Sept. 10, 2013). Participation in Exchanges also facilitates federal regulation of both insurers (who are subjected to numerous rules and requirements in order to sell their products on Exchanges) and individuals (who are required by the individual

mandate to purchase comprehensive insurance policies).

23. The Act provides that, by January 1, 2014, "[e]ach State shall establish" an insurance exchange to "facilitate[] the purchase of qualified health plans." ACA § 1311(b)(1). But, under the Constitution's core federalism commands, the federal government cannot *compel* sovereign states to create Exchanges. The Act therefore also recognizes that some states may not be "electing State[s]," because they may not "elec[t] ... to apply" HHS regulations for the "establishment and operation of Exchanges"; or they might otherwise "fai[l] to establish [an] exchange," ACA § 1321 (a)-(c). It provides that if a state is "not an electing State" or if the HHS Secretary determines, "on or before January 1, 2013," that an "electing State will not have any required Exchange operational by January 1, 2014," then the Secretary "shall establish and operate such Exchange within the State." *Id.* § 1321(c). The federal government is therefore responsible for establishing and operating Exchanges in states that decline to do so.

24. The Act encourages states to establish Exchanges with a variety of incentives, chiefly the premium assistance subsidy for state residents purchasing individual health coverage through State-established Exchanges. *See* ACA § 1401. Targeted at low- and moderate-income individuals and families, the subsidy is available to households with incomes between 100 percent and 400 percent of the federal poverty line. *See* ACA § 1401(c)(1)(a). Under the 2013 federal poverty guidelines, a single person with income between $11,490 and $45,960, or a

married couple with income between $15,510 and $62,040, would qualify for the subsidy. *See* Annual Update of the HHS Poverty Guidelines, 78 Fed. Reg. 5182 (Jan. 24, 2013).

25. The payment of the subsidy is conditioned on the individual purchasing insurance through an Exchange established by a state. The Act provides that a tax credit "shall be allowed" in a particular "amount," 26 U.S.C. § 36B(a), with that amount based on the monthly premiums for a "qualified health pla[n] offered in the individual market within a State which cover the taxpayer, the taxpayer's spouse, or any dependent ... of the taxpayer *and which were enrolled in through an Exchange established by the State under [§] 1311 of the Patient Protection and Affordable Care Act*," *id.* § 36B(b)(2)(A) (emphasis added). Therefore, there is no premium assistance subsidy under the Act unless the citizen pays for insurance obtained through a State-established Exchange. Confirming the point, the statute calculates the subsidy by looking to "coverage months," defined as months in which the taxpayer "is covered by a qualified health plan described in subsection (b)(2)(A) *that was enrolled in through an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act*." 26 U.S.C. § 36B(c)(2)(A)(i) (emphasis added). Again, unless the citizen has enrolled in a plan through a state-created Exchange established under § 1311 of the ACA, he gets no subsidy.

B. Federal Subsidies Trigger the Individual Mandate Penalty

26. The availability of the subsidy triggers the Act's individual mandate penalty for many otherwise-

exempt individuals. That mandate requires all "applicable" individuals to obtain "minimum essential coverage." ACA § 1501(d); 26 U.S.C. § 5000A(a). Failure to comply with that requirement triggers a penalty. 26 U.S.C. § 5000A(b). But that penalty does not apply to those "who cannot afford coverage" or who would suffer "hardship" if forced to buy it. *Id.* § 5000A(e)(1), (5). Under HHS regulations implementing these statutory provisions, an individual may obtain an advance exemption from the individual mandate penalty, called a "certificate of exemption," if the annual cost of health coverage exceeds eight percent of his projected household income for that year. *See* 45 C.F.R. § 155.605(g)(2); *see also* 26 U.S.C. § 5000A(e)(l)(A). That cost is calculated as the annual premium for the cheapest bronze insurance plan available in the Exchange in that person's state, minus "the credit allowable under section 36B [ACA § 1401(a)]." 26 U.S.C. § 5000A(e)(1)(B)(ii).

27. In states that do not establish their own Exchanges, no tax credit is "allowable." *Id.* Thus, by purporting to make the credit allowable in such states, the IRS Rule decreases the net cost of coverage for individuals in those states and thus increases the number of people in those states who are subject to the individual mandate's penalty. Now ineligible for certificates of exemption, those individuals are no longer free to forgo coverage without being exposed to penalties, or to buy inexpensive, high-deductible, catastrophic coverage (which is otherwise restricted by the Act to individuals under age 30 (*see* ACA, § 1302(e)).

C. 34 States Decline To Establish Their Own Exchanges

28. Exercising the option granted by the Act (and required by the Constitution), 34 states have decided not to establish Exchanges. 27 states—including Virginia—have opted out of the Exchange regime completely, while another seven have opted only to assist the federal government with its operation of federally-established Exchanges. *See* Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers, 77 Fed. Reg. 18,310, 18,325 (Mar. 27, 2012) (categorizing such "partnership" Exchanges as federally-established).

D. The IRS Promulgates a Regulation Ignoring the ACA's Limitations on Subsidies

29. Under the text of the Act, premium assistance subsidies are not available in the 34 states with federally-established Exchanges. But the IRS has promulgated a rule requiring the Treasury to disburse subsidies in those states regardless. Specifically, the Rule states that subsidies shall be available to anyone "enrolled in one or more qualified health plans through an Exchange," and defines "Exchange" to mean "a State Exchange, regional Exchange, subsidiary Exchange, and *Federally-facilitated Exchange*." *See* Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378, 30,387 (May 23, 2012) (emphasis added). (Regional and subsidiary Exchanges are, like ordinary state Exchanges, established by states under § 1311 of the Act.) The Rule adopts this definition even as the same regulation elsewhere admits that a "federally-facilitated Exchange" is "an Exchange established

and operated ... by *the Secretary* under *section 1321(c)(1)* of the [ACA]," 45 C.F.R. § 155.20 (emphases added), not by the *State* under *section 1311* of the Act, as the ACA expressly requires in its subsidy provisions.

30. The IRS justified its regulation with only the following short explanation:

> The statutory language of section 36B and other provisions of the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange. Moreover, the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges. Accordingly, the final regulations maintain the rule in the proposed regulations because it is consistent with the language, purpose, and structure of section 36B and the Affordable Care Act as a whole.

77 Fed. Reg. at 30,378.

31. Under the IRS Rule, premium assistance subsidies are thus available in the 34 states that declined to establish their own Exchanges. In turn, those subsidies expand the reach of the individual mandate penalty for individuals residing in those states.

IV. CLAIMS

COUNT I:
Rulemaking in Violation of the Administrative Procedure Act ("APA")

32. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

33. The APA forbids agency action "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C). It further forbids agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A).

34. The ACA unambiguously restricts premium assistance subsidies to state-established insurance Exchanges. The plain text of the statute makes subsidies available only to individuals who enroll in insurance plans "through an Exchange established by the State under [§] 1311 of the [Act]." 26 U.S.C. § 36B(b)(2)(A). But an exchange established by the federal government under the authority of § *1321* of the Act is not "an Exchange established by the State under [§] *1311* of the [Act]." The IRS's reading is contrary to the Act's plain language.

35. Congress understood the distinction between Exchanges established by a state under § 1311 of the Act and Exchanges established under other authority in the Act, and consciously distinguished between the two. For example, ACA § 1312(d)(3)(D) provides that

> after the effective date of this subtitle, the only health plans that the Federal Government may make available to Members of Congress and congressional staff with respect to their service as a Member of Congress or congressional staff shall

> be health plans that are—(I) created under this Act (or an amendment made by this Act); or (II) offered through *an Exchange established under this Act* (or an amendment made by this Act). (Emphasis added.)

36. By authorizing federal premium assistance subsidies to individuals who do not qualify under the statute, the IRS Rule exceeds the agency's statutory authority and is arbitrary, capricious, and contrary to law.

37. Even assuming *arguendo* that the Act grants the IRS the discretion to authorize federal subsidies for individuals enrolled in plans from Exchanges not established by a state, the statutory interpretation offered by the IRS in support of the Rule is arbitrary, capricious, unsupported by a reasoned basis, and contrary to law.

38. Plaintiffs have no adequate or available administrative remedy; in the alternative, any effort to obtain an administrative remedy would be futile.

39. Plaintiffs have no adequate remedy at law.

40. Defendants' action in promulgating the IRS Rule imposes a certainly impending harm on Plaintiffs that warrants relief.

V. REQUESTS FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court:

1. Enter a declaratory judgment that the IRS Rule violates the APA;
2. Enter a preliminary and permanent injunction prohibiting the application or enforcement of the IRS Rule; and

3. Award all other relief as the Court may deem just and proper, including any costs or fees to which Plaintiffs may be entitled by law.

Dated: September 16, 2013
Washington, District of Columbia

Respectfully submitted,

/s/ Jonathan Berry
Michael A. Carvin (*application for admission pending*)
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Walter D. Kelley Jr. (VSB No. 21622)
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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

DAVID KING, *et al.*, *Plaintiffs*,	)	
v.	)	No. 3:13-CV-630 (JRS)
KATHLEEN SEBELIUS, *et al.*, *Defendants.*	)	

DECLARATION OF DAVID KING

I, David King, do hereby declare:

1. I will be 63 years old as of January 1, 2014.

2. I am married. I have no dependents. I smoke tobacco products.

3. I am a citizen of the United States and a resident of the Commonwealth of Virginia. I live at 6214 John Wayne Drive, Fredericksburg, Virginia 22407.

4. I am self-employed as a limousine driver. I project that my modified adjusted gross income for 2014 will be $39,000. This figure includes all income attributable to my household.

5. I am not eligible for health insurance from the government or any employer.

6. The annual premium for the lowest-cost bronze plan available to me in the individual market in the federally-established Exchange in Virginia in 2014 will exceed eight percent of my projected household income in 2014. Accordingly, absent any eligibility for federal subsidiaries, I would be exempt in 2014 from the individual mandate penalty and I would be

entitled to obtain, before January 1, 2014, a "certificate of exemption" so certifying. That certificate of exemption would entitle me to purchase catastrophic insurance coverage, or forgo all coverage without any fear of incurring a penalty under the Affordable Care Act.

7. However, if I am eligible for a federal subsidiary in 2014, that would reduce my "required contribution" under the Affordable Care Act to the point that I will be disqualified from the unaffordability exemption to the individual mandate penalty and unable to obtain a certificate of exemption. Thus, if I am eligible for a federal subsidy in 2014, I will be forced either to pay a tax penalty or to buy Affordable Care Act-compliant health coverage for 2014, and I will be prohibited from purchasing catastrophic coverage for 2014.

8. I do not want to purchase ACA-compliant health coverage in 2014.

9. Moreover, because eligibility of the subsidy obligates me to spend money in the near future (on either ACA-compliant coverage or a penalty), I am forced to immediately engage in financial planning to set aside funds sufficient for those purposes. My financial strength and fiscal planning are immediately and directly affected by this exposure to costs and/or liabilities.

I do declare under penalty of perjury that the foregoing is true and correct.

Executed on this day of September 20, 2013.

/s/ David King
David King

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

DAVID KING, *et al.*, *Plaintiffs*,	)	
v.	)	No. 3:13-CV-630 (JRS)
KATHLEEN SEBELIUS, *et al.*, *Defendants.*	)	

DECLARATION OF BRITTANY LA COUTURE

1. I am a health policy researcher at the Cato Institute specializing in implementation and effects of the Patient Protection and Affordable Care Act, in particular the Internal Revenue Service final rule implementing the Act's premium-assistance tax credits. I hold a Juris Doctorate from Georgetown University Law Center.

2. Plaintiffs and their counsel have asked me to review insurer rate filings to determine the cheapest "bronze" health plan and second-cheapest "silver" health plan that have been approved for sale on Virginia's federally facilitated Exchange for four individuals, based on their age, county or municipality of residence, gender, and smoking or non-smoking status. I have personally reviewed the relevant filings, and my findings are set forth below.

3. For a 63-year-old male smoker who resides at 6214 John Wayne Drive, Fredericksburg, Virginia 22407, the cheapest bronze plan approved for sale on the federal Exchange in Virginia costs $634.98 per month. The second-cheapest silver plan for the same individual, but without taking into account the

"smoking surcharge" (*i.e.*, assuming that he did not smoke) would cost $643.99 per month.

4. For a 62-year-old male non-smoker who resides at 4839 Kempsville Greens Parkway, Virginia Beach, Virginia 23462, the cheapest bronze plan approved for sale on the federal Exchange in Virginia costs $477.51 per month. The second-cheapest silver plan for the same individual would cost $625.02 per month.

5. For a 63-year-old female non-smoker who resides at 2724 Mohawk Drive, Richmond, Virginia 23235, the cheapest bronze plan approved for sale on the federal Exchange in Virginia costs $392.73 per month. The second-cheapest silver plan for the same individual would cost $584.53 per month.

6. For a 55-year-old female smoker who resides at 2209 County Drive, Petersburg, Virginia 23803, the cheapest bronze plan approved for sale on the federal Exchange in Virginia costs $356.01 per month. The second-cheapest silver plan for the same individual, but without taking into account the "smoking surcharge" (*i.e.*, assuming that she did not smoke) would cost $441.56 per month.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this 16th day of September, 2013.

/s/ Brittany La Couture
Brittany La Couture

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

DAVID KING, *et al.*, *Plaintiffs,*	)	
v.	)	No. 3:13-CV-630 (JRS)
KATHLEEN SEBELIUS, *et al.*, *Defendants.*	)	

DECLARATION OF DOUGLAS HURST

I, Douglas Hurst, do hereby declare:

1. I will be 62 years old on January 1, 2014.

2. I am married. I have no dependents.

3. I am a citizen of the United States and a resident of the Commonwealth of Virginia. I live at 4839 Kempsville Greens Parkway, Virginia Beach, Virginia 23462.

4. I am semi-retired. I project that my modified adjusted gross income for 2014 will be $35,000. These figures include all income attributable to my household.

5. I am not eligible for health insurance from the government or any employer.

6. The annual premium for the lowest-cost bronze plan available to me in the individual market in the federally-established Exchange in Virginia in 2014 will exceed eight percent of my projected household income in 2014. Accordingly, absent any eligibility for federal subsidies, I would be exempt in 2014 from the individual mandate penalty and I would be entitled to obtain, before January 1, 2014, a

"certificate of exemption" so certifying. That certificate of exemption would entitle me to purchase catastrophic insurance coverage, or forgo all coverage without any fear of incurring a penalty under the Affordable Care Act.

7. However, if I am eligible for a federal subsidy in 2014, that would reduce my "required contribution" under the Affordable Care Act to the point that I will be disqualified from the unaffordability exemption to the individual mandate penalty and unable to obtain a certificate of exemption. Thus, if I am eligible for a federal subsidy in 2014, I will be forced either to pay a tax penalty or to buy Affordable Care Act-compliant health coverage for 2014, and I will be prohibited from purchasing catastrophic coverage for 2014.

8. I do not want to purchase ACA-compliant health coverage in 2014.

9. Moreover, because eligibility for the subsidy obligates me to spend money in the near future (on either ACA-compliant coverage or a penalty), I am forced to immediately engage in financial planning to set aside funds sufficient for those purposes. My financial strength and fiscal planning are immediately and directly affected by this exposure to costs and/or liabilities.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this day, September 13, 2013.

/s/ Douglas Hurst
Douglas Hurst

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

DAVID KING, *et al.*, *Plaintiffs,*	)	
v.	)	No. 3:13-CV-630 (JRS)
KATHLEEN SEBELIUS, *et al.*, *Defendants.*	)	

DECLARATION OF BRENDA LEVY

I, Brenda Levy, do hereby declare:

1. I will be 63 years old on January 1, 2014.

2. I am unmarried. I have no dependents.

3. I am a citizen of the United States and a resident of the Commonwealth of Virginia. I live at 2724 Mohawk Drive, Richmond, Virginia 23235.

4. I am employed as a substitute teacher. I project that my modified adjusted gross income for 2014 will be $43,000.

5. I am not eligible for health insurance from the government or any employer.

6. The annual premium for the lowest-cost bronze plan available to me in the individual market in the federally-established Exchange in Virginia in 2014 will exceed eight percent of my projected household income in 2014. Accordingly, absent any eligibility for federal subsidies, I would be exempt in 2014 from the individual mandate penalty and I would be entitled to obtain, before January 1, 2014, a "certificate of exemption" so certifying. That certificate of exemption would entitle me to purchase

catastrophic insurance coverage, or forgo all coverage without any fear of incurring a penalty under the Affordable Care Act.

7. However, if I am eligible for a federal subsidy in 2014, that would reduce my "required contribution" under the Affordable Care Act to the point that I will be disqualified from the unaffordability exemption to the individual mandate penalty and unable to obtain a certificate of exemption. Thus, if I am eligible for a federal subsidy in 2014, I will be forced either to pay a tax penalty or to buy Affordable Care Act-compliant health coverage for 2014, and I will be prohibited from purchasing catastrophic coverage for 2014.

8. I do not want to purchase ACA-compliant health coverage in 2014.

9. Moreover, because eligibility for the subsidy obligates me to spend money in the near future (on either ACA-compliant coverage or a penalty), I am forced to immediately engage in financial planning to set aside funds sufficient for those purposes. My financial strength and fiscal planning are immediately and directly affected by this exposure to costs and/or liabilities.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this day, September 13, 2013.

/s/ Brenda Levy
Brenda Levy

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

DAVID KING, *et al.*, *Plaintiffs*,	)	
v.	)	No. 3:13-CV-630 (JRS)
KATHLEEN SEBELIUS, *et al.*, *Defendants.*	)	

DECLARATION OF ROSE LUCK

I, Rose Luck, do hereby declare:

1. I will be 55 years old as of January 1, 2014.

2. I am married. I have no dependents. I smoke tobacco products.

3. I am a citizen of the United States and a resident of the Commonwealth of Virginia. I live at 2209 County Drive, Petersburg, Virginia 23803.

4. I project that my modified adjusted gross income for 2014 will be $45,000. This figure includes all income attributable to my household.

5. I am not eligible for health insurance from the government or any employer.

6. The annual premium for the lowest-cost bronze plan available to me in the individual market in the federally-established Exchange in Virginia in 2014 will exceed eight percent of my projected household income in 2014. Accordingly, absent any eligibility for federal subsidiaries, I would be exempt in 2014 from the individual mandate penalty and I would be entitled to obtain, before January 1, 2014, a "certificate of exemption" so certifying. That

certificate of exemption would entitle me to purchase catastrophic insurance coverage, or forgo all coverage without any fear of incurring a penalty under the Affordable Care Act.

7. However, if I am eligible for a federal subsidiary in 2014, that would reduce my "required contribution" under the Affordable Care Act to the point that I will be disqualified from the unaffordability exemption to the individual mandate penalty and unable to obtain a certificate of exemption. Thus, if I am eligible for a federal subsidy in 2014, I will be forced either to pay a tax penalty or to buy Affordable Care Act-compliant health coverage for 2014, and I will be prohibited from purchasing catastrophic coverage for 2014.

8. I do not want to purchase ACA-compliant health coverage in 2014.

9. Moreover, because eligibility of the subsidy obligates me to spend money in the near future (on either ACA-compliant coverage or a penalty), I am forced to immediately engage in financial planning to set aside funds sufficient for those purposes. My financial strength and fiscal planning are immediately and directly affected by this exposure to costs and/or liabilities.

I do declare under penalty of perjury that the foregoing is true and correct.

Executed on this day of September 14, 2013.

/s/ Rose Luck
Rose Luck

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DAVID KING, *et al.*, *Plaintiffs*,	)	
v.	)	No. 3:13-CV-630 (JRS)
KATHLEEN SEBELIUS, *et al.*, *Defendants.*	)	

DECLARATION OF DONALD B. MOULDS

I, Donald B. Moulds declare as follows:

1. I am the Acting Assistant Secretary for Planning and Evaluation at the U.S. Department of Health and Human Services (HHS). I have held this position since August, 2012. In this position, I am responsible for major activities in policy coordination, legislation development, strategic planning, policy research, evaluation, and economic analysis of Health Insurance Marketplace premiums. The statements made in this declaration are based on my personal knowledge, information contained in agency files, and information furnished to me in the course of my official duties.

2. On October 1, 2013, the Health Insurance Marketplace became open to public use. HHS operates Virginia's Health Insurance Marketplace ("the Marketplace"). The premiums on the Marketplace vary by, among other factors, rating

area, tobacco use, and the age of the covered individual.

3. I understand that, according to the September 19, 2013 declaration filed by plaintiff David King in the above-captioned matter, Mr. King resides in Fredericksburg, Virginia, will be 63 years old on January 1, 2014, is a smoker, is married, and has no dependents. *See* September 19, 2013 King Decl., No. 5-1. I also understand from this declaration that Mr. King projects his modified adjusted gross income for 2014 to be $39,000. *See id.*

4. I understand that, according to the September 19, 2013 declaration filed by plaintiff Douglas Hurst in the above-captioned matter, Mr. Hurst resides in Virginia Beach, Virginia, will be 62 years old on January 1, 2014, is married, and has no dependents. *See* September 19, 2013 Hurst Decl., No. 5-3. I also understand from this declaration that Mr. Hurst projects his modified adjusted gross income for 2014 to be $35,000. *See id.*

5. I understand that, according to the September 19, 2013 declaration filed by plaintiff Brenda Levy in the above-captioned matter, Ms. Levy resides in Richmond, Virginia, will be 63 years old on January 1, 2014, is unmarried, and has no dependents. *See* September 19, 2013 Levy Decl., No. 5-4. I also understand from this declaration that Ms. Levy projects her modified adjusted gross income for 2014 to be $43,000.

6. I understand that, according to the September 19, 2013 declaration filed by plaintiff Rose Luck in the above-captioned matter, Ms. Luck resides in Petersburg, Virginia, will be 55 years old on January 1, 2014, is a smoker, is married, and has no

dependents. *See* September 19, 2013 Luck Decl., No. 5-5. I also understand from this declaration that Ms. Luck projects her modified adjusted gross income for 2014 to be $45,000.

7. Assuming the facts set forth in paragraph 3, above, Mr. King, according to the Virginia Marketplace, would pay – before the application of any premium tax credits – a monthly premium of $564.33 for the lowest-cost catastrophic qualified health plan (QHP) and $648.38 for the lowest-cost bronze QHP. Assuming the facts set forth in paragraph 3, above, because Mr. King's household income in 2014 will be $39,000, under 26 U.S.C. § 36B, he will be eligible for a 36B premium tax credit of $373.00 per month. After applying this tax credit to the lowest cost bronze QHP, that plan will cost Mr. King $275.38 per month. Because the cost of that plan, after applying the tax credit, would exceed 8% of Mr. King's household income for 2014 (*i.e.*, $260 per month), Mr. King would be exempt from the penalty that could be assessed for a failure to maintain minimum essential coverage (again, assuming the facts set forth in paragraph 3, above). *See* 26 U.S.C. § 5000A(e)(1).

8. Assuming the facts set forth in paragraph 4, above, Mr. Hurst, according to the Virginia Marketplace, would pay – before the application of any premium tax credits – a monthly premium of $415.61 for the lowest-cost catastrophic QHP and $477.49 for the lowest-cost bronze QHP. Assuming the facts set forth in paragraph 4, above, because Mr. Hurst's household income in 2014 will be $35,000, under 26 U.S.C. § 36B, he will be eligible for a 36B premium tax credit of $415.00 per month.

After applying this tax credit to the lowest cost bronze QHP, that plan will cost Mr. Hurst $62.49 per month.

9. Assuming the facts set forth in paragraph 5, above, Ms. Levy, according to the Virginia Marketplace, would pay – before the application of any premium tax credits – a monthly premium of $245.56 for the lowest-cost catastrophic QHP and $392.72 for the lowest-cost bronze QHP. Assuming the facts set forth in paragraph 5, above, because Ms. Levy's household income in 2014 will be $43,000, under 26 U.S.C. § 36B, she will be eligible for a 36B premium tax credit of $244.00 per month. After applying this tax credit to the lowest cost bronze QHP, that plan will cost Ms. Levy $148.72 per month.

10. Assuming the facts set forth in paragraph 6, above, Ms. Luck, according to the Virginia Marketplace, would pay – before the application of any premium tax credits – a monthly premium of $373.08 for the lowest-cost catastrophic QHP and $428.67 for the lowest-cost bronze QHP Assuming the facts set forth in paragraph 6, above, because Ms. Luck's household income in 2014 will be $45,000, under 26 U.S.C. § 36B, she will be eligible for a 36B premium tax credit of $96.00 per month. After applying this tax credit to the lowest cost bronze QHP, that plan will cost Ms. Luck $332.67 per month. Because the cost of that plan, after applying the tax credit, would exceed 8% of Ms. Luck's household income for 2014 (*i.e.*, $300 per month), Ms. Luck would be exempt from the penalty that could be assessed for a failure to maintain minimum essential coverage (again, assuming the facts set

forth in paragraph 6, above). *See* 26 U.S.C. § 5000A(e)(1).

11. The calculations described above assume that each of the plaintiffs intends to buy individual coverage on the Marketplace. The plaintiffs who are married – Mr. King, Mr. Hurst, and Ms. Luck – have not, to my knowledge, made any allegations regarding the coverage status of their spouses. Without further information regarding these plaintiffs' spouses, it is not possible to calculate the projected costs of premiums for family coverage for these plaintiffs, but it is possible that even greater savings may be available to these plaintiffs if they purchase family coverage.

I declare under penalty of perjury that the foregoing is true and correct and to the best of my knowledge and belief.

Executed this 16th day of October, 2013, in Washington, District of Columbia.

/s/ Donald B. Moulds
Donald B. Moulds